

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-9704

File: 47-501110; Reg: 17086090

MCCARTHY'S BAR GROUP, INC.,
dba Tidal Bay Beach Bar
3522-24 East Anaheim Street,
Long Beach, CA 90804,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: n/a

Appeals Board Hearing: November 1, 2018
Ontario, CA

ISSUED NOVEMBER 20, 2018

Appearances: Appellant: Robert McCarthy, in propria personam,

Respondent: Kerry K. Winters, as counsel for the Department of Alcoholic Beverage Control.

OPINION

McCarthy's Bar Group, Inc., doing business as Tidal Bay Beach Bar, appeals from a Decision Following Default by the Department of Alcoholic Beverage Control¹ suspending its license for 30 days because it failed to comply with a request to examine its books and records, in violation of Business and Professions Code section 25616.

FACTS AND PROCEDURAL HISTORY

¹The Department's Decision Following Default, dated May 8, 2018, is set forth in the appendix.

Appellant's on-sale general eating place license was issued on August 11, 2010, and there is one prior instance of discipline against the license.

The instant case is based on an investigation which began in December of 2015. Agents were assigned to investigate a complaint that appellant had received a free Bud Light cooler from its wholesaler, Anheuser-Busch, LLC. Department agents went to the licensed premises and asked the licensee how he obtained the cooler. Robert McCarthy, president of McCarthy's Bar Group, Inc. indicated to the agents that he rents the cooler from Anheuser-Busch for \$10 per month. The agents told appellant he would need to provide a copy of the lease documents and proof of payment for the cooler. Appellant was provided with a Notice to Produce Records. (See Investigative Report, Exh. 3.)

Appellant failed to provide the requested documents and, on February 16, 2016, a second Notice to Produce Records was sent by certified mail to the premises address on file. It was returned to the Department marked "undeliverable." The agent in charge researched the premises, found another address, and re-sent the notice on April 14, 2016. (*Ibid.*) Confirmation from the U.S. Postal Service indicated that someone signed for the certified mail at the premises.

The licensee still failed to produce the requested records. Thereafter, on January 23, 2017, a third Notice to Produce Records was sent to the premises. It was returned to the Department on March 24, 2017 marked "Return to Sender. Unclaimed." (*Ibid.*) On June 26, 2017, the agent in charge asked Agent Gray to hand-deliver the Notice to Produce Records to the premises and to advise the licensee of the statute requiring licensees to produce records requested by the Department and the potential penalty for failing or refusing to provide the requested records. (*Ibid.*) The next day, Agent Gray hand-delivered the Notice to Produce Records and advised an employee at the premises of the importance of responding to the letter. He asked her to have the licensee contact the Department within ten days. Appellant did not

produce the requested documents. (*Ibid.*)

Thereafter, on November 1, 2017, the Department instituted an accusation against appellant charging that it failed to allow or refused to comply with a request to examine books and records, in violation of Business and Professions Code section 25616.

The accusation was served by on appellant on November 1, 2017, along with the Notice of Defense, Statement re: Discovery, and the Department's Request for Discovery. It was sent by certified mail to the address of record as required by California Code of Regulations, title 4, section 145. No response of any kind was received by the Department. Accordingly, on May 8, 2018, the Department issued a Decision Following Default and it was served on appellant on May 11, 2018. Appellant did not file a Notice of Defense, nor did it request relief from the default judgement.

Appellant then filed a timely appeal maintaining it now has copies of its original lease agreement and invoices documenting proof of payment for the cooler.

DISCUSSION

Under Government code section 11520(c), the recipient of a Decision Following Default is entitled to serve a written motion on the Department, requesting that the decision be vacated. The Department then has discretion to vacate the decision and grant a hearing — provided the respondent has demonstrated good cause.

"Good cause" includes (but is not limited to): failure to receive notice, mistake, inadvertence, surprise, or excusable neglect. "[A] default may not be set aside unless the moving party fulfills the burden of showing its entry through mistake, inadvertence, surprise, or excusable neglect." (*Ray Kizer Constr. Co. v. Young* (1968) 257 Cal.App.2d 766, 65 [Cal.Rptr. 267].)

Appellant did not request that the decision be vacated, nor did it demonstrate any of the permissible bases to establish good cause. Appellant merely stated that it communicated by phone and email with Department Agent Lee Riegler when the matter at hand came to its

attention. Appellant provided no explanation for its failure to comply with the record-keeping requirement in section 25616.

Appellant's Notice of Appeal fails to put forth a basis for an appeal — it simply states that it now has copies of its original lease agreement and invoices documenting proof of payment for a cooler. It provides no rationale for why the Appeals Board should offer relief from the 30-day suspension imposed for failure to comply with Business and Professions Code section 25616 for nearly three years, nor does it contend that the Department erred in any way.

Business and Professions Code § 25616 provides that a misdemeanor is committed by:

“any person who refuses to permit the department or any of its representatives to make any inspection or examination for which provision is made in this division, or who fails to keep books of account as prescribed by the department, or who fails to preserve such books for the inspection of the department for such time as the department deems necessary or who alters, cancels or obliterates entries in such books of account for the purpose of falsifying the records of sales of alcoholic beverages . . . ”

(Bus. & Prof. Code, § 25616.) In the instant case, it appears from the limited record before the Board that appellant did not comply with this record-keeping and inspection requirement when requests were made on multiple occasions by the Department.

Written notice of the opportunity to file briefs in support of appellant's appeal was given on July 10, 2018. Appellant, however, did not file a brief.

The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It was appellant's duty to show the Board that some error existed. (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710]; *Sutter v. Gamel* (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880].) To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16 [126 Cal.Rptr.2d 178].)

Appellant has put forth no justification or basis for its appeal — other than its assertion that it now stands ready to provide the information first requested in 2015. This, unfortunately, is an insufficient ground for an appeal.

While our hands may be tied in regards to our ability to completely overturn the decision in this matter, we find scant evidence in the record to support the harsh penalty imposed. It has always been the Board's understanding that the Department suspends an alcoholic beverage license in order to encourage licensees to comply with the law relating to the sale of alcoholic beverages — for the overall protection of the general public.

As explained in *Yapp v. State Bar* (1965) 62 Cal.2d 809 [44 Cal.Rptr. 593], while the purpose of a criminal proceeding may be to punish a wrongdoer, the purpose of a disciplinary proceeding is to protect the public — not to punish. Similarly, in the Department's Initial Statement of Reasons in support of the adoption of Rule 144, it states that disciplinary action is "for the protection of the public" and not to punish licensees. (Initial Statement of Reasons, CA Code Regs., tit. 4, § 144.) Here, as appellant explained at oral argument, the severe penalty will put him out of business.

We fail to see how a 30-day suspension in this matter encourages compliance or protects the public in any way. While some discipline is warranted, the Board would strongly encourage the Department to reduce the harsh discipline imposed here, which seems to be punitive rather than remedial in nature.

ORDER

The decision of the Department is affirmed, but with the reservations about the penalty expressed above.²

²This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION
AGAINST:

TK MANAGEMENT INC
TILTED KILT PUB & EATERY
12409 MARIPOSA RD
VICTORVILLE, CA 92395-6017

ON-SALE GENERAL EATING PLACE -
LICENSE

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.



RIVERSIDE DISTRICT OFFICE

File: 47-548753

Reg: 17085860

AB: 9701

RECEIVED
ABC APPEALS BOARD

2018 JUN 11 PM 2:40

CERTIFICATION

I, Dominique Williams, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on June 11, 2018, in the City of Sacramento, County of Sacramento, State of California.


Office of Legal Services

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

TK MANAGEMENT INC
TILTED KILT PUB & EATERY
12409 MARIPOSA ROAD
VICTORVILLE, CA 92395-6017

ON-SALE GENERAL EATING PLACE - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

RIVERSIDE DISTRICT OFFICE

File: 47-548753

Reg: 17085860

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on March 27, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after May 8, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: March 28, 2018



Matthew D. Botting
General Counsel

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

TK Management Inc.
dba Tilted Kilt Pub & Eatery
12409 Mariposa Road
Victorville, California 92395-6017

Respondent

On-Sale General Eating Place License

} File: 47-548753
}
} Reg.: 17085860
}
} License Type: 47
}
} Word Count: 20,733
}
} Reporter:
} Brywn Whatford
} Kennedy Court Reporters
}
} **PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Bernardino, California, on December 14, 2017.

Jonathan Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Mina M. Matta, represented Respondent, TK Management Inc., which was not represented by counsel.

The Department seeks to discipline the Respondent's license on the grounds that, on or about January 19, 2017, the Respondent, through its agent or employee, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to wit: distilled spirits, to Osiris Cecilia Estopin an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on December 14, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on August 24, 2017.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 47, on-sale general eating place license to the Respondent for the above-described location on December 22, 2014 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license. .
4. At the start of the hearing, the parties stipulated that the drink alleged in count one of the accusation was distilled spirits.
5. Osiris Cecilia Estopin was born on March 26, 1996. On January 19, 2017, she was 20 years old.
6. On January 19, 2017, at approximately 9:50 p.m., Department Agents Mehul Patel (Agent Patel) and Gilbert Castillo (Agent Castillo) arrived in a plain clothes capacity at the Licensed Premises; conducting Departmental enforcement/spot checks in the Victorville, high desert area. At the front entrance of the Licensed Premises a security guard checked the agents' identification (ID) and gave them blue Bud Light wrist bands to indicate they were 21 years or older. The agents proceeded to the center of the Licensed Premises near fixed tables by the fixed bar. Agent Patel ordered an 805 beer from a waitress, who happened to walk by them. The agents remained in that position for a few minutes and began surveying the crowd for anyone who looked under 21 years of age consuming alcoholic beverages.
7. The agents then proceeded to the southwest corner of the fixed bar and began observing the patrons. The agents immediately noticed a group of three patrons, two females seated at the southwest side of the fixed bar and a male patron standing behind the females. The agents noticed that one of the females had on her wrist a blue wristband, as did the male patron standing behind the females. The agents both noticed the second female, who appeared youthful to them and who did not have a wristband. The youthful appearing female was later identified as Osiris Cecilia Estopin (hereinafter referred to as minor Estopin). The agents continued to observe minor Estopin to determine whether she would consume alcoholic beverages.
8. The agents then observed a bartender performing bartending duties behind the bar. The bartender was later identified as Brock Zareh Markarian (hereinafter referred to as bartender Markarian). The agents saw bartender Markarian make two alcoholic beverages using distilled spirits from the well in front of minor Estopin and her friend. Bartender Markarian made both distilled spirit beverages, later identified as a Sex On The Beach cocktail, which is an alcoholic beverage. Bartender Markarian mixed the Sex On The Beach cocktails and placed them on the bar counter directly in front of minor Estopin. Minor Estopin slid the first Sex On The Beach drink to her female friend seated directly next to her. Minor Estopin grabbed the second distilled spirit beverage placed in

front of her and took a sip from the glass, consuming the alcoholic beverage. Bartender Markarian appeared to be facing minor Estopin while she took the said sip. Bartender Markarian did not check to see whether minor Estopin was wearing a blue Bud Light wristband or not, and he did not ask minor Estopin for her ID.

9. Bartender Markarian collected payment for the two Sex On The Beach cocktails from minor Estopin's female friend, who had ordered the two said cocktail drinks from the bartender while seated at the same location at which she paid for the drinks with a credit card. At no time during the evening did bartender Markarian ask for minor Estopin's ID.

10. Agents Patel and Castillo then approached the three said patrons and identified themselves as police officers. Agent Castillo asked to see the IDs of the female and male companion to minor Estopin. Agent Castillo determined the male and female to be over the age of 21. Agent Patel made contact with minor Estopin and asked her for her ID. Minor Estopin provided her California Driver License to Agent Patel. Minor Estopin's California Driver License has a vertical orientation, and shows her correct date of birth. (Exhibit 2A.) Agent Patel asked minor Estopin what drink she was drinking, to which she replied, "Sex On The Beach." Agent Patel asked her if she knew what kind of alcohol that drink contained. Minor Estopin said she believed the drink contained vodka and some juice. The drink tasted like it had alcohol in it to minor Estopin.

11. Once Agent Patel confirmed minor Estopin to be under 21 years of age he requested that Agent Castillo secure the alcoholic beverage from which minor Estopin had taken a sip. Agent Castillo took possession of minor Estopin's cocktail, placed a small portion of the liquid drink into a sample bottle, sealed the bottle with a cap, and provided the bottled liquid to Agent Patel.²

12. The agents escorted minor Estopin to the vestibule of the main entrance inside the Licensed Premises where the agents continued their investigation. Agent Castillo took a photograph of minor Estopin in the vestibule of the main entrance of the Licensed Premises. (Exhibit 2B.) Agent Patel issued a citation to minor Estopin.

13. Agent Patel then went to the fixed bar and made contact with bartender Markarian. Agent Patel identified himself as a police officer to bartender Markarian and explained the violation to him. Agent Patel asked bartender Markarian if he saw the young girl with black hair that he served two drinks to on the other side of the bar, to which he replied, "Yeah I did. I just missed it. Sorry man. I should have checked to see if she had a [wrist] band on or not. I must have not have been paying attention" and added that he should have checked minor Estopin's ID. Agent Patel asked bartender Markarian if he remembered what alcoholic beverage he had served to minor Estopin, to which bartender

² Agent Patel later transported the bottled liquid to the Riverside District Office, placed a tape on it to secure it, logged, booked and placed it into the evidence locker.

Markarian replied, "Honestly I don't know. I think it was a mixed drink. Am I going to get fired?"

14. Agent Patel then spoke with Mina Matta, the on-site manager at the Licensed Premises. Both agents and Mr. Matta walked to an office and viewed the video surveillance of the incident. The video surveillance confirmed Agent Patel's observations of the said violation and what he observed that evening. (Exhibit A.)

15. Osiris Cecilia Estopin appeared and testified at the hearing. She appeared her age. Osiris Cecilia Estopin testified that bartender Markarian did not ask for her ID and served her distilled spirits at the Licensed Premises on January 19, 2017.

16. Bartender Brock Zareh Markarian appeared and testified at the hearing. He could not recall material matters about which he testified. He did not recall what happened on January 19, 2017, including how drinks were served and to whom he served drinks. Bartender Markarian did not recall the minor Estopin, or that she was seated at the bar. He recalled that after the violation the officer asked a lot of questions and he was not able to answer them "because I did not know the answers at the time."

17. Bartender Markarian acknowledged that Respondent's policy requires bartenders serve alcoholic drinks to patrons 21 years or older. January 19, 2017, was a Thursday night, normally the busiest night for Respondent, in that Respondent provides a Latin Caliente Night with a Spanish disc jockey, music and dance floor for patrons. Security checks patron identification at the door and places wristbands on patrons who are 21 years of age or older. Policy requires that bartenders still ask patrons for ID if they look 30 years of age or under, regardless if they are wearing a wristband or not. Bartender Markarian received an alcoholic beverage serving certificate, on-line from some third party entity, which he did not recall.

18. Bartender Markarian had to view the video surveillance to get an idea of what happened on January 19, 2017. From viewing that video he said minor Estopin's friend ordered two drinks from bartender Markarian. Bartender Markarian claimed the friend pointed to a male patron behind her and bartender Markarian asked if the second drink order was for the male patron. He claimed he asked for the ID of the friend. He did not recall if minor Estopin was seated next to the friend when the friend ordered the drinks. He did not recall whether he made two of the same kind of drink. He did not recall if he served both drinks at the same time. Then he claimed he served both drinks at the same time to the friend who ordered the drinks. He could not recall where the friend was when he served the two drinks. He thought she might have been on the same side of the pillar as when she ordered the drinks. He did not know what happened to the two drinks or where they were at the time he collected payment from the female friend to minor Estopin.

19. Bartender Markarian had never prior to January 19, 2017, seen minor Estopin or her friends. During cross-examination the Department attorney read from the agent's report, that Agent Patel asked bartender Markarian if he saw the young girl with black hair he served two drinks to on the other side of the bar, and that the report states bartender Markarian replied, "Yeah, I did. I just missed it. Sorry man. I should have checked to see if she had a [wrist] band on or not. I must have not been paying attention." The Department attorney queried bartender Markarian whether he recalled making that statement, to which bartender Markarian replied he did not recall. The Department attorney continued to read from the report, regarding Agent Patel's question as to what drink was served to that person, and read bartender Markarian's reply, "Honestly I don't know. I think it was a mixed drink. Am I going to get fired?" Bartender Markarian recalled making those statements.

20. Mina M. Matta appeared and testified at the hearing. He said on January 19, 2017, he was working as the on-site manager at the Licensed Premises. He did not witness the events to which the agents and minor Estopin testified or the violation at hand. He recalled seeing the agents with minor Estopin in the vestibule of the main entrance of the establishment where he approached the agents to ensure everything was okay. The agents informed Mr. Matta they would find him and talk to him when they were finished. Mr. Matta recalled that he went to bartender Markarian and asked him what had happened, to which bartender Markarian replied he did not know. Mr. Matta acknowledged that, regarding his narration during the watching of the video at the hearing, he was not present on January 19, 2017, when the events he narrated were occurring. His narrations of the video were descriptions of what he believed he saw was occurring on the video.

21. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on January 19, 2017, Respondent-Licensee's employee, Brock Zareh Markarian, inside the Licensed Premises, furnished an alcoholic beverage, to wit: distilled spirits, to Osiris Cecilia Estopin, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-13.)

5. Section 25660 provides a defense to any person who was shown and acted in reliance upon bona fide evidence of majority in permitting a minor to enter and remain in a public premises in contravention of section 25665, in making a sale forbidden by section 25658(a), or in permitting a minor to consume in an on-sale premises in contravention of section 25658(b).

The defense offered by this section is an affirmative defense. As such, the licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded, shown, and acted on as prescribed.³ To provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. This section applies to identifications actually issued by government agencies as well as those which purport to be.⁴ A licensee or his or her employee is not entitled to rely upon an identification if it does not appear to be a bona fide government-issued identification or if the personal appearance of the holder of the identification demonstrates above mere suspicion that the holder is not the legal owner of the identification.⁵ The defense offered by section 25660 is not established if the appearance of the minor does not match the description on the identification.⁶ Thus, reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered.

6. In the present case, the Respondent failed to meet their burden of proof in establishing any of the elements of the affirmative defense. They did not show that evidence of majority and identity was demanded, shown, and acted on as prescribed. Bartender Markarian failed to request to see Osiris Cecilia Estopin's ID and failed to even note that she was *not* wearing a blue Bud Light wrist band, which would have been a red flag to

³ *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control*, 261 Cal. App. 2d 181, 189, 67 Cal. Rptr. 734, 739 (1968); 27 Ops. Atty. Gen. 233, 236 (1956).

⁴ *Dept. of Alcoholic Beverage Control v. Alcoholic Control Appeals Bd. (Masani)*, 118 Cal. App. 4th 1429, 1444-45, 13 Cal. Rptr. 3d 826, 837-38 (2004).

⁵ *Masani*, 118 Cal. App. 4th at 1445-46, 13 Cal. Rptr. 3d at 838; *5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control*, 155 Cal. App. 2d 748, 753, 318 P.2d 820, 823-24 (1957); *Keane v. Reilly*, 130 Cal. App. 2d 407, 411-12, 279 P.2d 152, 155 (1955); *Conti v. State Board of Equalization*, 113 Cal. App. 2d 465, 466-67, 248 P.2d 31, 32 (1952).

⁶ *5501 Hollywood*, 155 Cal. App. 2d at 751-54, 318 P.2d at 822-24; *Keane*, 130 Cal. App. 2d at 411-12, 279 P.2d at 155 (construing section 61.2(b), the predecessor to section 25660).

him that she was under the age of 21 and should not have been served alcoholic beverages. It would have been incumbent upon bartender Markarian to demand to see her ID given that Osiris Cecilia Estopin appears her age, which was 20 at the time of said violation. Bartender Markarian testified that policy requires he ask for ID of patrons appearing under 30. Minor Estopin certainly did not appear 30. At the hearing, Osiris Cecilia Estopin appeared her age, in-person, to the undersigned. In fact, sworn, direct testimony by Agents Patel and Castillo confirmed Osiris Cecilia Estopin had a youthful appearance on January 19, 2017, so much so that it caused both agents to become suspicious she was under 21 and to continue to observe her to determine whether she would consume alcoholic beverages. (Exhibit 2B). Bartender Markarian had never prior to January 19, 2017, seen minor Estopin or her friends. (Findings of Fact ¶¶ 4 through 10, 12, 15, 17, and 19.)

7. In determining the credibility of a witness, as provided in section 780 of the Evidence Code, the administrative law judge may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the testimony at the hearing, including the manner in which the witness testifies, the extent of the capacity of the witness to perceive, to recollect, or to communicate any matter about which the witness testifies, a statement by the witness that is inconsistent with any part of the witness's testimony at the hearing, the extent of the opportunity of the witness to perceive any matter about which the witness testifies, the existence or nonexistence of any fact testified to by the witness, and the existence or nonexistence of a bias, interest, or other motive.

8. If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evidence Code, section 412.)

9. Using the factors set forth in the Evidence Code sections above, and in balancing the conflicting testimony between the agents and bartender Markarian, the agents' testimony is deemed more credible. The agents had a better recollection of material matters. The contentions and claims made by bartender Markarian are disbelieved because bartender Markarian could not recall material matters about which he testified, presented conflicting, self-serving testimony, and exhibited a bias in the presentation of his testimony as an employee to protect his employment. Agents Patel and Castillo have no bias or motive in the presentation of their testimony. Bartender Markarian admitted that he did *not recall* what happened on January 19, 2017, including how drinks were served and to whom he served drinks. Bartender Markarian did *not recall* the minor Estopin, or that she was seated at the bar. He did *not recall* if minor Estopin was seated next to her friend when her friend ordered the drinks. He did *not recall* whether he made two of the same kind of drink. He did *not recall* if he served both drinks at the same time. Then he claimed he served both drinks at the same time to the friend who ordered the drinks. He could *not recall* where the friend was when he served the two drinks. When asked

whether he apologized to Agent Patel, bartender Markarian claimed, he “*may have* apologized,” claiming it was “for the inconvenience,” for Agent Patel taking time out of his day, but *did not recall* apologizing for serving an alcoholic beverage to a minor. He *did not recall* saying, “Yeah, I did. I just missed it. Sorry man. I should have checked to see if she had a [wrist] band on or not. I must have not been paying attention.” His self-serving statement that he asked the female, when she ordered the drinks, for whom the second drink was, conflicts with the agents’ credible testimony that bartender Markarian placed both drinks in front of minor Estopin. If, in fact, bartender Markarian had asked the female for whom the second drink was and the female stated it was for the male behind her, then why did not bartender Markarian hand the first drink to the female and the second drink to the male, who stood behind the female instead of minor Estopin. Bartender Markarian made another inconsistent statement that he “assumed the two drinks [he] was making were for the people, for her and *whoever* she ordered for” Bartender Markarian claimed that after he served both drinks at the same time to the female who ordered the drinks he did not see what happened to the drinks after that because he “turned around to help the next guest.” Immediately thereafter, bartender Markarian admitted that he did not then help the next guest, but collected payment from the female who ordered the drinks in the form of a credit card, then turned to the register to process the sale/payment, and admitted that when she signed the credit card receipt he did not *recall* if the two drinks were still in front of the female, the person he claimed to have placed the drinks before.

10. The Respondent referenced conflicting testimony between the agents and minor Estopin relating to whether bartender Markarian made the two drinks separately or at the same time, and whether he served them both at once, or separately, to the minor, or to the minor and her friend. First of all, the difference is without material consequence. The testimony of either minor Estopin or the agents, by themselves, is sufficient to establish that a violation occurred. Either way, bartender Markarian, without checking for minor Estopin’s wristband or ID, served a distilled spirit to Estopin, who was a minor.⁷

PENALTY

The Department requested the Respondent’s license be suspended for a period of 15 days, given the short duration of licensure. The Respondent did not recommend a penalty in the event the accusation was sustained. The Respondent argued that dismissal of the accusation was appropriate. The Respondent argued that bartender Markarian simply made a mistake, “he never intentionally served alcohol to a minor.” Section 25658(a) is not an intent-based statute—the seller’s intent does not determine whether there is a

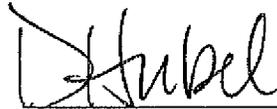
⁷ It should be noted that all three of the Department’s witnesses testified credibly. People do not usually describe the same event in the same manner —word choice, and so forth will naturally vary from person to person. The minor differences in the testimony between the agents and minor Estopin do **not** call into question their credibility.

violation or not. Similarly, rule 144⁸ does not list lack of intent or mistake as mitigation factors. The penalty recommended herein complies with rule 144.

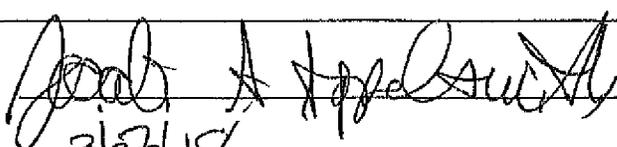
ORDER

The Respondent's on-sale general eating place license is hereby suspended for a period of 15 days.

Dated: January 16, 2018



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 3/27/18

⁸ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.